be dependent to a substantial degree upon the exercise of skill. According to a South Australian Court in the case of *Terry's Motors Limited* v. *Rinder*,[5] "substantial" is "a word of no fixed meaning; it is an unsatisfactory medium for carrying the idea of some ascertainable proportion of the whole". In the British House of Lords' case of *Palser* v. *Grinling*[6] Viscount Simon said of the word "substantial" in connection with the phrase "substantial portion" as follows:—

"One of the primary meanings of the word is equivalent to considerable, solid, or big. It is in this sense that we speak of a substantial fortune, a substantial meal, a substantial man, a substantial argument or ground of defence."

Therefore, in my view it would be an offence under the said section 4(1)(h)(ii) of the Common Gaming Houses Ordinance, if any competition is conducted in connection with any trade or business where success in it did not depend on the exercise of a considerable amount of skill.

As I was satisfied that the learned Magistrate's judgment was against the weight of the evidence as recorded in the case, I therefore allowed the appeal and reversed his order of acquittal and discharge. I found the respondent guilty of the offence as charged and convicted him accordingly and imposed a fine of $500 in default one month's imprisonment.

*Appeal allowed.*

Solicitors: *Lim Ewe Hock & Co.*

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## CHANG FOOK SHEN v. TAN SUAN SIM

**[O.C.J. (Gunn Chit Tuan J.)**
**November 6, 1978 & February 19, 1979]**
**[Penang — Civil Suit No. 290 of 1973]**

*Land Law — Conveyancing — Agreement for sale of land — Balance of purchase price to be paid at later date — Completion — Whether time essence of contract — Specific Performance — Undesirability of same solicitor acting for both vendor and purchaser — Specific Relief Act, 1950, s. 23.*

*Contract — Sale of land — Specific Performance — Specific Relief Act, 1950, s. 23.*

The defendant agreed to sell to the plaintiff her land and house. The plaintiff paid the sum of $2,000 as deposit and it was agreed that the balance of the purchase price was to be paid at a later date. The plaintiff had to obtain a bank loan but it appeared that the loan could not be released until the transfer was executed. The defendant insisted on payment of the balance before execution of the transfer and demanded payment "on or before June 10, 1974" failing which the defendant purported to cancel the contract. The plaintiff applied for specific performance of the agreement.

**Held:** the defendant in this case was in a position to perform the contract and should have been given reasonable time to do so. In the circumstances specific performance of the contract should be ordered.

*Cases referred to:-*

(1) *Ong Kim Khoon* v. *Gaya Filem Berhad* [1979] 1 M.L.J. 79.
(2) *Jennings* v. *Zihari-Kiss* [1972] 2 S.A. S.R. 493.
(3) *James* v. *Smith* [1931] 2 K.B. 317, 332.
(4) *Smith* v. *Hamilton & Anor.* [1951] 1 Ch. D. 174, 179.
(5) *S. Ayadurai* v. *Lim Hye* [1959] M.L.J. 143, 144.
(6) *Killner* v. *France* [1946] 2 All E.R. 83, 86.
(7) *Palmer* v. *Lark* [1945] Ch. D. 182, 194, 195.
(8) *Green* v. *Sevin* 13 Ch. D. 589, 599.
(9) *Re Barr's Contract* [1956] Ch. D. 551, 556.
(10) *MacBryde* v. *Weekes* (1856) 22 Beav. 553, 543.
(11) *Hexter* v. *Pearce* [1900] 1 Ch. D. 341, 346.
(12) *Rudd* v. *Lascelles* [1900] 1 Ch. D. 815, 818.

CIVIL SUIT.

*R.J. Manecksha* (*Ajmer Singh Sandhu* with him) for the plaintiff.

*Ho Sen Feek* for the defendant.

*Cur. Adv. Vult.*

**Gunn Chit Tuan J.:** This was a claim for specific performance, or alternatively for damages for breach, of an agreement in writing dated July 14, 1973, which was prepared by the parties themselves by which the defendant, a business woman, agreed to sell to the plaintiff, a school teacher, her land and hereditaments comprised in Title No. 529 and known as Lot 609 Mukim 18 North-East District, Penang, together with the house thereon bearing No. 38 Fettes Road, Penang (hereinafter referred to as "the said property") at the price of $34,500. On signing the said agreement a sum of $2,000 was paid by the plaintiff as deposit and to account of the said purchase price of $34,500. It was provided in the said agreement that the balance of the purchase price was to be paid at a later date.

In his evidence in chief, the plaintiff (PW2) explained that by "a later date" it was meant that they had to wait until he got a bank loan. He had approached the Chartered Bank for a loan before July 10, 1973 and this was confirmed by a 'Valuation for mortgage' dated July 14, 1973 prepared by Messrs. C.H. Williams and Company (Sendirian), chartered surveyors, valuers and estate agents (see page 1 of agreed bundle of documents marked 'A') wherein it was stated that acting on instructions received from the Chartered Bank, Beach Street, Penang dated July 10, 1973, they had inspected 38 Fettes Road, Penang for the purpose of preparing a valuation. Under cross-examination, the plaintiff said that he was sure of getting a loan which was approved in July 1973, but final payment could only be made when the bank's lawyers, Messrs. Presgrave and Matthews, released the loan. He confirmed that he did tell the defendant about the said loan when the said agreement was prepared.

The plaintiff also called his solicitor, Mr. Ajmer Singh Sandhu (PW1), to give evidence. Mr. Ajmer Singh Sandhu told the court that he had acted for both the plaintiff and the defendant some time in 1974. At that time he did explain to the defendant that the plaintiff was negotiating for a bank loan which was then forthcoming. He had also explained to the defendant that she would have to execute a transfer before the said loan was available to the plaintiff to enable him to pay her the balance of the purchase price. The defendant was at that time agreeable to payment of the balance of the purchase price after the Chartered Bank's solicitors have approved and released the loan to the plaintiff. According to Mr. Ajmer Singh the said loan was released to him in June 1974 subject to his undertaking not to release it to the defendant until a transfer had been executed by her as the vendor. The title deed of the said property was left with him by the defendant when he applied for a loan on behalf of the plaintiff.

Under cross-examination, Mr. Ajmer Singh said that he first acted for the defendant in April 1974, although he had acted for the plaintiff in 1973 when he filed this suit for the plaintiff in August/September 1973. He also said that after reading the letters at pages 14 and 15 of the agreed bundle of documents marked 'A', he thought that there was a dispute between the parties about the exchange of houses, but when the defendant came to him in April 1974 there was no dispute about the exchange of any houses and that the defendant had indicated to him that she was prepared to sign a transfer and proceed with the sale of her house. After he had explained the matter to her she agreed to execute a transfer which was to be sent to the bank's solicitors, Messrs. Presgrave and Matthews, to enable the plaintiff's loan to be released. But before a transfer was ready for execution by the defendant, she had discharged him and gone over to another advocate and solicitor, Mr. Lim Cheng Chuan. When challenged, Mr. Ajmer Singh Sandhu said that it was not correct to suggest that the defendant discharged him because he had insisted that she should sign a transfer and confirmed once again that the defendant had in fact told him that she was willing to sign the transfer first to be sent to Messrs. Presgrave and Matthews.

It must be pointed out at this stage that the Federal Court has in its recent judgment in *Ong Kim Khoon* v. *Gaya Filem Berhad*[1] referred to the undesirability of the same solicitor acting for both vendor and purchaser. In that case, their Lordships referred to the view of Bray C.J. in *Jennings* v. *Zihari-Kiss*[2] that "it is not only undesirable but wrong, whether the adviser in question is a solicitor or a land agent. It is impossible for the same person to give satisfactory service as the confidential and expert adviser of both parties with conflicting interests. The man who undertakes to serve two masters may easily find himself in the position where he must be false to one and possibly to both. . .". In the present case the defendant had called two other advocates and solicitors to give evidence. The first advocate and solicitor, Mr. Lim Cheng Chuan (DW1), told the court that he has been in practice since February 1959 and has been practising conveyancing for the last ten years. He has acted for both vendors and purchasers and said that in the absence of express terms the place of completion is at the vendor's solicitors' office. A vendor must produce a good title and execute a negotiable transfer while the buyer on his part has to pay the balance of the purchase price. He then said that if he was acting for a vendor he would advise his client not to execute a transfer before payment of the purchase price. This witness was not cross-examined, but in answer to a question by the court, he admitted that he had come across instances where a bank's solicitors have insisted on a signed transfer before release of the bank loan.

The other advocate and solicitor called by the defendant was Mr. Gan Teik Chee (DW3). He told the court that some time in May 1974, the defendant came to see him and wanted to retain him concerning the sale of her house. She also told him that Mr. Ajmer Singh and then Mr. Lim Cheng Chuan were her previous solicitors. He then advised her that a vendor was entitled to insist on payment before signing a transfer. During cross-examination, Mr. Gan was referred to a letter dated June 12, 1974 appearing at page 38 of the agreed bundle of documents marked 'A', which was written by Mr. Ajmer Singh's firm to him. In that letter it was stated that copies of the transfer were enclosed for the defendant's execution and that on due execution of the transfer forms a cheque would be forwarded to him in exchange for the transfer. Mr. Gan said that his client refused to accept that offer although he had told her that it was alright to accept it. He added that the defendant had asked him whether she was obliged to accept it and he had told her that it was "not usual". Mr. Gan also admitted that he had spoken to one Mr. Patkunam, an advocate and solicitor, who acted for the bank in question and he was aware that the bank in question was willing to release the money.

Although it was undesirable and wrong for the same solicitor to have acted for both the vendor and the purchaser in this case and it has happened that Mr. Ajmer Singh Sandhu did not advise the defendant on the usual practice concerning the sale and transfer of a property, the important point, as I saw it in this case, was whether the defendant had, contrary to the usual practice, in fact expressly agreed to accept the balance of the purchase price after executing a transfer. After listening to the evidence of Mr. Ajmer Singh Sandhu in his examination-in-chief as well as under cross-examination, I was satisfied and found that he was a witness of truth and that the defendant had in fact told him in April 1974 that she was willing to execute the transfer to be sent to the bank's solicitors, Messrs. Presgrave and Matthews, to enable the plaintiff's loan to be released.

I found the defendant, on the other hand, not to be a witness of truth. Thus, for instance, she admitted in her examination-in-chief that it was true that the deposit of $2,000 was paid and yet when she went to see Mr. Gan Teik Chee she told him that she had not received the deposit of $2,000 as a result of which Mr. Gan Teik Chee wrote to Messrs. Ajmer Singh Sandhu on May 30, 1974 (see page 31 of the agreed bundle of documents marked 'A') to request payment of the deposit of $2,000 within 48 hours. Mr. Gan himself, after he was referred to the letter dated June 4, 1974 addressed to him by Messrs. Ajmer Singh Sandhu (see page 33 of the agreed bundle of documents marked 'A'), admitted that by June 4, 1974 he knew that the deposit of $2,000 had in fact been paid to the defendant. The defendant also claimed that when she signed the said agreement she did not agree to sign a transfer first, but under cross-examination she admitted that she was aware that the plaintiff was negotiating for a bank loan. When challenged further under cross-examination, she said that she could not remember whether Mr. Ajmer Singh had told her that she had to sign a transfer first before the bank would agree to release the loan to the plaintiff. I did not believe that answer of the defendant who chose to blame her memory rather than admit that Mr. Ajmer Singh had in fact told her that she would have to sign the transfer first before the plaintiff could obtain a loan to pay her the balance of the purchase price. For reasons best known to the defendant her-

self, she again elected to tell the court a lie when she said, after she was referred to a letter (see page 30 of the agreed bundle of documents marked 'A') from Messrs. Ajmer Singh to Messrs. Lim Cheng Chuan and Company enclosing a draft transfer, that she could not remember whether Mr. Ajmer Singh Sandhu had sent a draft transfer to Mr. Lim Cheng Chuan for her execution. Another obvious lie of the defendant was when she said that she had refused to sign the transfer in Mr. Ajmer Singh's office because he was not retained by her, but Mr. Gan Teik Chee in his evidence-in-chief told the court that Mr. Ajmer Singh and then Mr. Lim Cheng Chuan were the defendant's lawyers before she retained him and this can be confirmed in the letter dated April 8, 1974 (see page 23 of agreed bundle of documents 'A') written by Mr. Ajmer Singh to Messrs. Presgrave and Matthews wherein it was stated that he was then acting for both the plaintiff and the defendant.

In his submission, Mr. Ho, counsel for the defendant, conceded that in this case the said agreement of sale dated July 14, 1973 was a complete contract as its terms were not uncertain and clearly contained (a) the names of the parties to the contract, (b) the subject-matter, namely, Lot 609 Mukim 18 North-East District, Penang with house No. 38 Fettes Park, Penang thereon (c) the consideration namely $34,500 and (d) the intention to create contractual relationship.

However, on the question of completion, Mr. Ho referred to the following paragraph on 'Date of completion' in *Halsbury's* Laws of England (3rd Ed.) Vol. 34 at page 295 on the subject entitled 'Sale of Land': —

"Date for completion. In regard to the completion of the contract three dates are material, the date, if any, fixed by the contract for completion; the date when the vendor shows and verifies such a title as the purchaser can require; and the date of actual completion. In the ordinary course, completion consists in the purchaser paying the purchase-money, or the balance thereof and the vendor at the same time executing a conveyance and delivering possession to the purchaser; when these incidents are separated, the construction to be put upon a reference in the contract to the date for completion depends on the terms and subject matter of the contract, though it seems that the reference is as a general rule to be taken to be a reference to the complete conveyance of the estate and the final settlement of the business."

He argued that it was therefore quite clearly established that the purchaser must pay the purchase price or the balance thereof to complete the sale whereas the vendor must execute the proper transfer to the purchaser on receiving the balance of the purchase price. He contended that the obligation of the vendor to execute the transfer was simultaneous with the purchaser's obligation to pay the balance of the purchase price.

Mr. Ho also pointed that the said agreement of sale was an open or informal contract as it did not specify the date of completion and contended that in the absence of an express completion date, completion would have to take place within a reasonable time. He argued that since the completion date in this case was not fixed and although payment of the balance of the purchase price was stated to be "at a later date", it did not affect the general law that completion should take place within a reasonable time.

On specific performance, Mr. Ho referred to section 23(b) of the Specific Relief Act, 1950 which provides as follows: —

"23. Specific performance of a contract cannot be enforced in favour of a person —

(a) ....

(b) who has become incapable of performing, or violates, any essential term of the contract that on his part remains to be performed."

Mr. Ho also contended that the plaintiff was unable to pay the balance of the purchase price and because he has defaulted his part of the agreement he cannot ask for specific performance of the said agreement of sale. He pointed out that when the plaintiff first filed this action on August 30, 1973 he had no money to pay the balance of the purchase price of $32,500. He was still unable to pay the balance of the purchase price when he signed the judgment in default against the defendant on February 5, 1974. Counsel contended that by then whatever reasonable time for the plaintiff to perform his part of the contract had lapsed and that the plaintiff had by his act of filing an action for specific performance and obtaining an order thereon made time of the essence. The defendant was therefore entitled to rescind the contract of sale. Counsel also stated that the plaintiff was at all material times unable to complete the purchase by payment of the balance of the purchase price and was therefore not entitled to specific performance of the said agreement. With respect I could not accept the argument of counsel for the defendant on this point and would refer to the following *dictum* of Atkins J. in the case of *James* v. *Smith*[3] which was brought to my attention by counsel for the plaintiff: —

"I think that 'ability' does not depend upon whether the purchaser has the money in hand at the time; to my mind it is a question of fact. I do not think it depends upon whether he has a binding agreement by which some third person is obliged to provide him with resources to carry out the contract. I think it is sufficient if it is proved by the agent or by the purchaser that the circumstances are such that if the vendor had been ready and willing to carry out his contract, he on his part at the proper time could have found the necessary money to perform his obligation."

With respect I would agree that it is a question of fact for the court to decide in this case whether the plaintiff as a purchaser was in a position to perform his part of the contract. On the evidence adduced, I found as a fact that the plaintiff was able before the date on which the defendant purported to rescind the contract to perform his part of it, that is, to pay the balance of the purchase price. It was clear from the evidence that the loan from the Chartered Bank was already released to Mr. Ajmer Singh Sandhu, the plaintiff's solicitor, in June 1974 when the defendant through her solicitors purported to rescind the said agreement of sale. (See letters at pages 39 and 41 of the agreed bundle of documents marked 'A'). It was in fact the defendant who was not able and willing to perform her part of the said agreement and has been attempting as far back as July 1973 to avoid performance of and to cancel the said agreement. (See letters at pages 14 and 15 of the agreed bundle of documents marked 'A').

Counsel for the plaintiff, Mr. Manecksha, on the other hand, submitted *inter alia* that in the case of the sale of a private dwelling house, it would need very special circumstances to make time of the essence of

such a contract. He cited the case of *Smith* v. *Hamilton & Anor.*[4] in support of his contention. Counsel also argued that even if it was true that there were doubts about the plaintiff's ability to find the balance of the purchase money as alleged in paragraph 3 of the statement of defence, that in itself would not have made time of the essence of the contract when it was not otherwise so. He also submitted that as time was not of the essence initially, one cannot of one's own motion make it so by writing a letter. For this contention, counsel referred once again to the said English case of *Smith* v. *Hamilton.*[4] The facts of that case, as set out in the headnote, are as follows:

"The purchaser had on February 26, 1949, signed a memorandum that she had on that day purchased a dwelling house from the vendor at the price of £3,000 and that she had paid £300 to stakeholders as a deposit. The purchaser had difficulty in raising the balance of the purchase money and on March 29, 1949, the purchaser's solicitors wrote to the vendor's solicitors stating 'we understand that... it will not be possible to complete the purchase on the date fixed by the contract.' The vendor thereupon instructed the estate agents that in the event of the purchaser's not completing by April 19, 1949, they were to sell elsewhere and by a letter dated April 5, 1949, the vendor informed the purchaser that the vendor reserved all his rights under the contract, but was prepared without prejudice to delay exercising such rights until April 19, 1949. By a letter dated April 19, 1949 the purchaser was notified by the vendor's solicitors that 'the deposit has become forfeited' and that the vendor was proposing to resell. On April 21, 1949, the house was resold. On May 2, 1949 the purchaser offered to complete, then having the money available. It was held 'inter-alia' that as time was not initially of the essence of the contract as regards completion it was impossible for the vendor unilaterally to make it so in the absence of some impropriety on the part of the purchaser sufficient to entitle him so to do."

The local law as to time being of the essence of the contract is the same as in England. (See *S. Ayadurai* v. *Lim Hye*[5]).

With respect to the submissions of both counsel, there can be no doubt that the usual meaning of "completion" is 'the complete conveyance of the estate and final settlement of the business' (*per* Stable J. in *Killner* v. *France*[6]). Strictly speaking, if both the vendor and the purchaser or their solicitors cannot trust each other, then completion in theory takes place simultaneously or suddenly by snatch and swop with one side pushing forward the title deeds including a duly executed transfer and the other the purchase money or the balance thereof after adjustment of accounts. In the words of Vaisey J. in *Palmer* v. *Lark*[7]: "It is a fundamental principle that the payment of the purchase money and the delivery of the conveyance are to be performed interchangeably". However, as pointed out by the learned authors of *Halsbury's* Laws of England (3rd Ed.) in their above-quoted paragraph at page 295 of their said Volume 34, it is only "*in the ordinary course* (emphasis mine) that completion consists in the purchaser paying the purchase price or the balance thereof and the vendor at the same time executing a conveyance and delivering possession to the purchaser."

In this case, having regard to the terms of the said agreement dated July 14, 1973, it seems to me and I found that what the parties intended and what they have expressly agreed to is that completion should not be one in the ordinary course. No date was fixed by the agreement for completion and the parties have expressly stipulated that the balance of the purchase price was to be paid "at a later date". In the light of the evidence adduced I found that the parties intended that the balance of the purchase price was to be paid on, and the date of completion was to be, a date on or soon after the date the loan applied for by the plaintiff was released to him by the bank's solicitors. But in fairness to the defendant I must say that both she and the plaintiff probably were not aware at the time they signed the said agreement of July 14, 1973 that she had to execute a transfer before the plaintiff could secure the release of the bank's loan to pay her the balance of the purchase price. Nevertheless, I found on the evidence adduced that she was agreeable in April 1974, when she saw Mr. Ajmer Singh Sandhu to execute a transfer, and did in fact execute a transfer in the office of Mr. Gan Teik Chee some time in June 1974 (see letter at page 44 of agreed bundle of documents marked 'A'). I was aware that there was no consideration for the latter agreement and that the defendant was entitled to, after she had consulted the other two said solicitors, namely Mr. Lim Cheng Chuan and Mr. Gan Teik Chee, to refuse to take the unusual step of signing the transfer before payment of the balance of the purchase price. Moreover, I was of the view that although as contended by Mr. Ho that completion should take place within a reasonable time, yet the defendant could not, in this case, where time was not of the essence originally, to make it so unilaterally by notice. In the words of Fry J. in *Green* v. *Sevin*[8]:

"What right then had one party to limit a particular time within which an act was to be done by the other? It appears to me that he had no right so to do, unless there had been such delay on the part of the other contracting party as to render it fair that, if steps were not immediately taken to complete, the person given the notice should be relieved from his contract. It has been argued that there is a right in either party to a contract by notice so to engraft time as to make it of the essence of the contract where it has not originally been of the essence, independently of delay on the part of him to whom the notice is given. In my view there is no such right. It is plain upon principle, as it appears to me, that there can be no such right. That which is not of the essence of the original contract is not to be made so by the volition of one of the parties, unless the other has done something which gives a right to the other to make it so. You cannot make a new contract at the will of one of the contracting parties. There must have been such improper conduct on the part of the other as to justify the rescission of the contract 'sub modo', that is, if a reasonable notice be not complied with. That this is the law appears to me abundantly plain."

The above statement of the law was adopted by Harman J. in the abovementioned case of *Smith* v. *Hamilton.*[4]

Assuming however that the defendant had the right of making time of the essence, then in the words of Danckwerts J. in *Re Barr's Contract*[9] "once the right to serve a notice of the kind in question has arisen, the time allowed by the notice must be a reasonable time." The question then arises as to what time will be reasonable and the answer is that it all depends: —

"What constitutes a reasonable notice and a reasonable time to be fixed in it must depend upon the contract and the circumstances of each case" (*per* Romilly M.R. in *MacBryde* v. *Weekes*).[10]

In this case was the notice of the defendant dated May 30, 1974 (see page 31 of the agreed bundle of documents marked 'A') giving the plaintiff an ultimatum to pay the balance of the purchase price "on or before

June 10, 1974" a reasonable notice having regard to all the circumstances? On this point I would also respectfully adopt the observations of Danckwerts J. in *Re Barr's Contract*[9] at page 558: —

"... in naming a period which suddenly gives a definite requirement for completion and makes time of the essence in this way, regard must be had to all the circumstances of the case, and to the practical considerations of the ability in the circumstances of the purchaser to find the money, having regard to reasonable behaviour. ..."

In the present case, at the time the agreement was entered into it was not known when the plaintiffs' loan would be approved and released by the bank in question. A deposit of $2,000 was paid by the plaintiff to show good faith and up to April 1974 the defendant was prepared to execute a transfer to enable the plaintiff to secure the release of the bank loan. The letter dated May 30, 1974 was the first intimation the plaintiff received that the balance of the purchase price must be paid within 10 or 11 days. In all the circumstances of this case, I did not consider that a period of 10 or 11 days is a reasonable time. The purchaser has already by his solicitor's letter of June 12, 1974 (see letter at page 38 of agreed bundle of documents marked 'A'), within the not unreasonable period of twelve or thirteen days after receiving the said ultimatum in the defendant solicitors' said letter of May 30, 1974, offered to pay the balance of the purchase price by forwarding a cheque in exchange for the transfer. The plaintiff has asked for specific performance of the said agreement of July 14, 1973. Since the subject-matter of every contract for the sale of land is unique in the eyes of equity, specific performance of such contracts will be available almost as of right (see *per* Farwell J. in *Hexter* v. *Pearce*[11] and in *Rudd* v. *Lascelles*[12]). As the land with the house in question is still in the name of the defendant there would be no injustice in ordering specific performance, and in any case I considered that the court should in all the circumstances of this case exercise its discretion and accordingly made an order that the defendant do specifically perform the said agreement for the sale by her to the plaintiff of the said land comprised in title 529 and known as Lot No. 609 Mukim 18 North-East District, Penang together with house thereon bearing No. 38 Fettes Road, Penang, upon the plaintiff paying the balance of the purchase price amounting to $32,500. I also ordered that the Senior Assistant Registrar of the High Court be empowered to execute the transfer of the said land, etc. on behalf of the defendant and that the defendant pay the plaintiff the costs of this action.

Immediately after I made my above orders, counsel for the defendant applied for stay of execution. I allowed stay pending appeal without requesting both counsel to address me on this point. On reflection I may have erred in allowing stay of execution in view of the fact that the proper plaintiff, a school teacher, instituted this action on September 10, 1973 and has been waiting since then for a decision of the High Court in this matter and for the land and house which he contracted to buy from the defendant nearly seven years ago!

*Order accordingly.*

Solicitors: *Ajmer Singh Sandhu & Co.; Ho Sen Feek.*

## HOTEL JAYA PURI BHD. v. NATIONAL UNION OF HOTEL, BAR & RESTAURANT WORKERS & ANOR.

**[O.C.J. (Salleh Abas F.J.) March 9, 1979]**
**[Kuala Lumpur — Originating Motion No. 90 of 1978]**

*Administrative Law — Certiorari — Error of law on face of record — Retrenchment of workers — Compensation ordered by court — No legal basis.*

*Industrial Law — Retrenchment of workers on closure of business — Workers employed for less than three years — Compensation ordered by Industrial Court — No legal basis for payment of compensation — Award quashed — Joining party — Whether party can be joined as respondent and whether award can be made against such party — Hotel and Restaurant — Essential unity of group — Lifting veil of incorporation — Industrial Relations Rules, 1967, rr. 12 & 13 — Industrial Relations Act, 1967, s. 29 & 60G.*

*Company Law — Lifting the veil of incorporation — Essential unity of group.*

In this case a number of workers employed by the Jaya Puri Chinese Garden Restaurant Sdn. Bhd. were retrenched by the Company as the business was closed owing to losses. The restaurant was carried on in premises belonging to the Hotel Jaya Puri Berhad and both the hotel and the restaurant had the same managing director. A dispute arose between the National Union of Hotel, Bar and Restaurant workers representing the workers and the Restaurant and the dispute was referred to the Industrial Court. The Union sought to have the Hotel joined as a party alleging that the workers were the employees of the Hotel and that they were dismissed and not retrenched as alleged by the Restaurant. The Industrial Court in its award found that (1) the workers were employees of the Hotel and not of the Restaurant; (2) the closure of the business of the restaurant was proper and genuine; and (3) the termination of service of the employees was a discharge of workers following the closure of business and not retrenchment as understood and accepted in industry. The court also awarded two months' basic salary and fixed allowances as compensation. The Hotel applied to the High Court to quash the award on the grounds (a) the award against the Hotel was an error in law as under section 29 of the Industrial Relations Act and the Industrial Relation Rules no claim and no award can be made against the party added, although it may make a claim; (b) the Hotel was not the employer of the workers in question and (c) the termination of the workers was retrenchment and no compensation was payable as none of them had completed three years' minimum service.

**Held:** (1) the Industrial Court has a discretion to add a party as an additional claimant or an additional respondent and if the party is added as a respondent, it can be made subject to the award. In any case the matter is purely procedural and does not affect the jurisdiction of the Industrial Court at all;

(2) the finding of the learned President of the Industrial Court that the Hotel and the Restaurant were in reality one enterprise was in no way against the principle of separate entity and was not unreasonable;

(3) the termination of the service of the workers was proper and there was no legal basis for the award of compensation to the workers. There was an error on the face of the record and the award should be quashed.

*Cases referred to:-*

(1) *Smith, Stone and Knight* v. *Birmingham Corporation* [1938] 4 All E.R. 116.

(2) *Re F.G. (Films) Limited* [1955] 1 W.L.R. 483.

(3) *Firestone Tyre & Rubber Co.* v. *Llewelyn* [1957] 1 W.L.R. 464.

(4) *Salomon* v. *Salomon & Co.* [1897] A.C. 22.

(5) *Pipraich Sugar Mills Ltd.* v. *Pipraich Sugar Mills Mazdur Union* A.I.R. 1957 S.C. 95.